

**Testimony of Robin L. Dahlberg
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American Civil Liberties Union**

**Committee on Judiciary
Michigan House of Representatives**

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Representative Constan, Representative Amash and other members of the Committee on Judiciary of the Michigan House of Representatives:

I am pleased to appear before you today on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, and to lend my support to House Bill No. 5676. The ACLU, its Michigan affiliate, attorney Frank Eaman and the law firm, Cravath Swain & Moore, represent the plaintiffs in the lawsuit, *Duncan v. Granholm*. Filed in the Ingham County Circuit Court in February 2007, the suit was brought on behalf of current and future public defense clients in Berrien, Genesee and Muskegon Counties against the State and Governor of Michigan. It alleges that the public defense systems in the three counties are failing and asks that defendants be compelled to provide those systems with essential financial and administrative resources. Passage of House Bill No. 5676 and the adequate funding of the state-wide public defense system created by that bill would be important steps towards resolving the issues raised by our lawsuit.

Over the last 15 years, the ACLU has pioneered the use of litigation to reform failing public defense programs. To date, we have filed six such suits, four of which resulted in favorable settlements that included increased funding and better administrative oversight. We are currently litigating two, one of which is the *Duncan* case.

The allegations in *Duncan* mirror those in the four suits that settled. Plaintiffs claim as follows:

Pursuant to the Sixth Amendment of the United States Constitution, the State of Michigan is required to provide indigent persons charged with criminal wrongdoing access to effective assistance of competent counsel. Although Michigan may delegate that responsibility to its counties, it must take the steps necessary to ensure that the counties have public defense programs that are capable of providing constitutionally adequate legal representation.

Michigan has abdicated its responsibilities with respect to Berrien, Genesee and Muskegon Counties – and, according to a 2008 report by the National Legal Aid and Defender Association, many other counties throughout the state. These counties neither adequately fund nor adequately administer their public defense programs.

Ten years ago, in 1999, the nation's 100 largest counties spent an average of \$287

per case on public defense services. Today, Muskegon County spent less than one-half that amount and Berrien spent less than one-third.

To keep costs low, public defense attorneys carried staggering workloads. In 2004, for example, six Berrien County public defense attorneys received a collective total of 4,479 felony and misdemeanor cases for an average of over 746 cases per attorney. One regularly handled a caseload of over 1200 cases per year – 700 misdemeanors, 300 felonies and 200 private cases. National standards recommend that no one attorney handle more than 150 felonies per year or no more than 400 misdemeanors per year. As far as we know, nothing has changed.

None of the three counties have promulgated defense attorney performance standards; provides attorney training; supervises or monitors attorney performance; or provides attorneys with funding for investigators, support staff and experts. Attorneys are required to ask the court for permission to hire an expert but because such requests are routinely denied they are rarely made.

The lack of funding and effective administration deprives public defense attorneys who work in the three counties of the tools necessary to provide effective legal representation. They cannot meet with their clients, investigate their clients' cases, file appropriate motions and prepare properly for court appearances and trials. As a result, their clients suffer grievous harms.

- A Genesee County public defense attorney permitted a client to plead guilty to failure to pay restitution to his ex-wife even though he had already paid her the money owed.
- A Muskegon County public defense attorney forced his client to plead no contest to a crime he did not commit. The attorney refused to take the case to trial even though there was no evidence connecting the client to the crime and three alibi witnesses willing to testify that the client was nowhere near the crime scene on the day the crime was committed.
- A Berrien County public defense attorney failed to object when a court sentenced a client charged with contempt to 7 days more than the maximum sentence permitted under state law. Fortunately, a court clerk discovered the error.

Sadly, these stories are not unique to Berrien, Muskegon and Genesee Counties. The Michigan Campaign for Justice, together with the Innocence Project at the University of Michigan Law School and the State Appellate Defender Office, has identified an astonishing number of individuals from across the state who did not receive the type of adversarial legal representation contemplated by the Sixth Amendment.

- St. Claire County resident Frederick Mardlin currently sits in prison, convicted of arson after the trial court refused to permit his attorney to hire an electrical engineer and a fire expert to investigate the crime scene. An expert who agreed to

work for Mr. Mardlin's appellate attorney on a pro bono basis subsequently determined that the fire in question had not been set intentionally – no accelerant was ever found at the scene – but caused by faulty electrical wiring. Mr. Mardlin has spent 3 years in prison.

- Wayne County resident Karl Vinson currently sits in prison, convicted of rape despite the fact that blood type testing of the semen found on the victim's bed sheet revealed that he could not have been the perpetrator. His public defense attorney never sought the expert testimony necessary to challenge the prosecution's wrongful presentation of that evidence. Mr. Vinson has spent 24 years in prison.

The State of Michigan has long known of the deficiencies in its counties' public defense programs. They were documented in reports and articles published in 1978, 1986, 1992, 2002, 2003, 2004, 2005 and 2006. The *Duncan* complaint contends that the because the United States Supreme Court has made clear that Sixth Amendment's obligation to provide effective assistance of competent counsel runs to the state, the state must finally step forward to remedy them.

Today, the *Duncan* lawsuit is currently before the Michigan Supreme Court. Immediately after it was filed, the Governor and the State of Michigan moved to dismiss the suit, alleging that they were not responsible. Instead, the counties were, and if the counties were not, the state legislature was. Its motion was denied at the trial level. The state appealed. The denial of the motion was affirmed by the Court of Appeals in a lengthy and thoughtful opinion. The state has now sought permission to appeal the Court of Appeals' ruling to the Supreme Court. We have every reason to believe that if the Supreme Court affirms the Court of Appeal's decision we shall prevail in this lawsuit just as we did in the four that preceded it.

Rather than wait for the resolution of the *Duncan* case, however, the Michigan Legislature should pass and fund House Bill No. 5676. The bill seeks to establish a floor beneath which the quality of public defense services in the state shall not be permitted to fall. Towards that end, it will replace the current 83 county-administered public defense programs with a statewide public defense system administered by a commission appointed by the governor and funded by the state.

The bill requires the commission to divide the state into service delivery regions; determine the manner in which public defense services will be provided in each region; establish offices in each region to oversee the delivery of services; establish rates of compensation for individuals employed by or under contract with the system; promulgate attorney performance standards, workload standards and standards governing the use of investigators and expert witnesses; develop training programs and systems to supervise and monitor attorney performance; gather the data necessary to determine the financial and administrative needs of the system; and promulgate a budget. (Pre-existing public defense programs will be grandfathered into system provided they comply with the rules and regulations adopted by the commission.) The bill further requires the commission to

hire a state public defender and a state appellate defender to implement its policies and directives.

Until and unless the State does act, Michigan's citizens will continue to be wrongfully deprived of their liberty solely because their public defense attorney did not have the tools necessary to provide them with constitutionally adequate legal representation. This should be an intolerable burden to bear.